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FILED
AUG 6 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 236

UNITED STATES ex rel. WALTER GUTTERSON,
Relator,

against

E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

DAVID SAPERSTEIN,
Counsel for Petitioner.

INDEX

SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Summary and Short Statement of Matter Involved 1

Facts Involved 2

Jurisdiction 3

Questions presented:

1. Whether the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence is valid 4

2. Whether the Board of Parole retained jurisdiction over petitioner after the date when the maximum term of his sentence expired 4

Reasons relied on for allowance of writ:

1. Diversity of opinions 4

2. Present case differs from those in which parolee has been imprisoned for another offense while on parole 4

Prayer 5

BRIEF IN SUPPORT OF PETITION 7

Opinions of the Courts Below 7

Jurisdiction 7

Statement of Case 7

PAGE

Specification of errors:

1. Courts below erred in holding that execution of warrant eleven months after expiration of sentence was valid 8

2. Courts below erred in holding that Board of Parole retained jurisdiction after expiration of sentence 8

Summary of Argument 8

Argument:

POINT I—Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority 8

Conclusion 15

TABLE OF CASES CITED

	PAGE
Adams v. Hudspeth, 121 F. (2d) 270	12
Anderson v. Corall, 263 U. S. 193	13
Anderson v. Williams, 279 F. 822	4, 9, 11, 13
Clark v. Suprenant, 94 F. (2d) 969	4, 10, 11, 14
Henratty v. Zerbst, 9 Fed. Supp. 230	4, 9, 11, 13
Hogan v. Zerbst, 101 F. (2d) 634	14

STATUTES CITED

Judicial Code:

Section 240(a), as amended by Act of February 13, 1925 — 3

United States Code, Title 18:

Section 710 — 3, 11
Section 716b — 11
Section 717 — 9
Section 719 — 3, 9
Section 723c — 3

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES ex rel. WALTER GUTTERSON, Relator, against E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City, Respondent.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, WALTER GUTTERSON, relator, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review an order of that Court entered on May 17, 1943.

Summary and Short Statement of the Matter Involved

On June 15, 1942, petitioner was taken into the custody of respondent as a parole violator, under a warrant that had been issued on July 18, 1941. On July 30, 1942, a petition for a writ of habeas corpus on behalf of petitioner was verified by his wife, and a writ of habeas corpus issued on July 31, 1942, returnable on August 3, 1942 (R. pp. 2-5).

A return to the writ was made on behalf of respondent on August 12, 1942 (R. pp. 6-8). A traverse to the return was served and filed on behalf of petitioner on August 12, 1942 (R. pp. 8-9). Petitioner was released in $1,000 bail on August 12, 1942, pending the decision on the said writ.

An order dismissing the writ of habeas corpus and remanding petitioner to the custody of respondent was signed herein on November 2, 1942, and entered on November 5, 1942 (R. pp. 18-19).

Notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dismissing the writ of habeas corpus was served and filed on behalf of petitioner on November 6, 1942 (R. p. 20). On November 9, 1942, petitioner was released in $2,000 bail, pending the hearing and determination of that appeal (R. pp. 21-22).

On May 17, 1943, the United States Circuit Court of Appeals for the Second Circuit affirmed the order below dismissing the writ.

Facts Involved

On June 29, 1938, in the United States District Court for the Southern District of New York, petitioner was convicted of the crime of using the mails to defraud, and was sentenced to three years' imprisonment at the United States Penitentiary at Lewisburg, Pennsylvania (R. p. 3). As part of this sentence petitioner was also put on probation for two years, to commence at the expiration of his prison term. He began to serve his sentence on July 23, 1938. On November 10, 1940, petitioner was granted a parole for the remainder of the term of his sentence (R. p. 3). The full three-year term of the sentence expired on July 20, 1941.

From November, 1940, petitioner reported to the United States Board of Parole in Brooklyn, New York, regularly every month and filed his parole reports (R. p. 3). Beginning with September, 1941, and monthly thereafter, the United States Board of Parole required that petitioner file

reports of probation instead of parole reports, which petitioner did (R. p. 9).

On July 18, 1941, just three days before the expiration of petitioner's three-year sentence in full, a warrant for his arrest was issued by the Board of Parole for an alleged violation of the conditions of his release (R. p. 3). The warrant remained unexecuted until June 15, 1942, almost one year after the expiration of petitioner's maximum three-year term.

Respondent's return to the writ asserts that the warrant for petitioner's arrest was issued by the Board of Parole by reason of his arrest in the City of New York on June 15, 1941, on a charge of grand larceny in effecting the sale of a certain trust certificate (R. p. 7). However, on September 18, 1941, this charge was dismissed (R. p. 7).

Directly after the dismissal of this charge, petitioner was arrested on a technical misdemeanor charge, the information charging that the sale of the trust certificate constituted a violation of a civil injunction order which had been obtained against petitioner, on his consent (R. p. 7). Petitioner was paroled in the custody of his counsel. He had kept the Board of Parole fully advised of these proceedings and continued to report to the Board regularly. On June 15, 1942, while the case against petitioner remained undisposed of, he was arrested on the original warrant, issued July 18, 1941.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The retaking warrant was issued under the authority of Title 18 of the United States Code, Sections 717, 719 and 723c.

The date of the order which petitioner seeks to have reviewed is May 17, 1943.

Questions Presented

(1) Whether the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence is valid.

(2) Whether the Board of Parole retained jurisdiction over petitioner after the date when the maximum term of his sentence expired.

Reasons Relied On for the Allowance of the Writ

Petitioner prays that the writ herein be allowed for the reasons that:

(1) The decisions herein of the United States Circuit Court of Appeals for the Second Circuit and of the United States District Court for the Eastern District of New York are in conflict with the cases which hold that a retaking warrant must be executed by the Board of Parole within the maximum term of the sentence. *Clark* v. *Suprenant,* 94 F. (2d) 969; *Anderson* v. *Williams,* 279 F. 822; *Henratty* v. *Zerbst,* 9 Fed. Supp. 230.

(2) The situation here differs from those in which a parolee has been imprisoned for another offense during the time he has been on parole. Petitioner here was available at all times from the date of the issuance of the retaking warrant to the date of the expiration of his maximum sentence for the timely execution of the warrant.

Prayer

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that the cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Second Circuit be reversed; that petitioner's application for a writ of habeas corpus be granted; and that petitioner be granted such other, further and different relief as to this Court may seem proper.

Dated: New York City, New York, July 31, 1943.

WALTER GUTTERSON,
Petitioner.

DAVID SAPERSTEIN,
Counsel for Petitioner.

PETITIONER'S BRIEF

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES ex rel. WALTER GUTTERSON, Relator, against E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City, Respondent.	No.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of New York was filed October 23, 1942, and is reported in 47 F. Supp. 150.

The per curiam opinion of the United States Circuit Court of Appeals for the Second Circuit was filed on May 17, 1943, and has not yet been reported, so far as is known.

Jurisdiction

Stated in the petition (p. 3).

Statement of Case

The foregoing petition contains a statement of the material facts, as well as a statement of the questions involved.

Specification of Errors

(1) The United States Circuit Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York erred in holding that the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence was valid.

(2) The United States Circuit Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York erred in holding that the Board of Parole retained jurisdiction over petitioner after the date of expiration of the maximum term of his sentence.

Summary of Argument

Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority.

POINT I

Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority.

Under our Parole Laws, it is fundamental that a prisoner may earn the right to conditional release or parole. Such parole is by no means tantamount to freedom. It is, in fact,

a continuation of an ameliorated detention. To all intents and purposes a paroled prisoner is still serving his sentence when on parole but is no longer confined to the metes and bounds of a prison. However, he may still be restricted both in area and conduct for he is still deemed to be in legal custody.

Anderson v. *Williams,* 270 F. 822.
Henratty v. *Zerbst,* 9 Fed. Supp. 230.

If, while on parole, a prisoner violates the requirements of his now lesser restricted imprisonment, he is subject to recall by the Warden of the prison in which he had been confined, or by the Board of Parole. This is a pronouncement of the prevailing statute.

18 U. S. C. A. Sec. 717 provides:

"§717. SAME; VIOLATION OF PAROLE; WARRANT FOR RETAKING PRISONER.

If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner (June 25, 1910, c. 387, § 4, 36 Stat. 820)."

It is noteworthy that this section confines a warden in the issuance of a retaking warrant to the duration of the original term of sentence. And rightfully so, for upon revocation of parole a prisoner must re-serve all of the time he has served while on parole.

18 U. S. C. A. Sec. 719 provides:

"If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the

time the prisoner was out on parole shall not be taken into account, to diminish the time for which he was sentenced. As amended May 13, 1930, c. 255, § 1, 46 Stat. 272; June 29, 1940, c. 449, § 3, 54 Stat. 692."

These statutes are penal and must be strictly construed according to their tenor. Their requirements are clear. They are not meant to continue the jurisdiction of the Board of Parole over a prisoner after his sentence expires any more than the authorities of a prison are meant to have jurisdiction over a prisoner upon completion of sentence. To hold otherwise would make a parolee accountable to his Parole Board ad infinitum.

The term of sentence of the petitioner expired almost a year before the execution of the warrant. To deem such an arrest proper would mean that an arrest under a warrant four, six or even ten years after expiration of sentence would likewise be proper. A prisoner on parole, then, would be far worse off than a prisoner who never earned a parole.

Clark v. *Suprenant,* 94 F. (2d) 969, is exactly in point with the case at bar. There, appellee had been sentenced for a term of fifteen months which expired on July 14, 1936. In April of 1936 he was released, having earned "good time" under the provisions of 18 U. S. C. A. Sec. 710. On July 13, 1936, a few hours before the expiration of his maximum term, a warrant for his arrest was issued for violation of the conditions of his release. This warrant was executed on August 29, 1936, a month and a half after the end of the term of sentence. The Court sustained a writ of habeas corpus, holding that "jurisdiction to revoke paroles is thereby (18 U. S. C. A. Sec. 716b) exclusively conferred upon the Board of Parole only if action is taken before 'the expiration of the maximum term or terms specified in his sentence'" (at p. 973).

Obviously, by the word "action" the Court meant the execution of the warrant, not merely its issuance.

The Court in the *Clark* case considered the pertinent statutes at length and concluded from their terms "that

the Congress did not intend by this act to vest and did not vest in the Board the power to revoke such a parole after the parole and the term of imprisonment had expired, and thereby to enable it at any time, perhaps years after the termination of both, to invoke upon the prisoner another term of confinement in the penitentiary for a length of time equal to that part of his sentence which he served under the parole, * * *" (at p. 973).

The case of *Anderson* v. *Williams,* 279 F. 822, is likewise analogous to the case at bar. There, the prisoner's term expired on November 18, 1917. He had been paroled in 1914. In 1919 his parole was revoked and he was recommitted. The Court granted his release and said:

> "As these appellees served part of their sentences in the penitentiary and the remainders thereof under the authorized amelioration of their sentences wrought by their paroles, but still in the legal custody and under the control of the warden, and all this time subject to the revocation of their paroles, it is difficult to resist the conclusion that as soon as the times prescribed by their sentences had passed, the authority of the board to revoke their paroles and again to cause them to be imprisoned under their sentences had also passed" (at p. 834).

The language of the Court in *Henratty* v. *Zerbst* (1934), 9 Fed. Supp. 230, is likewise clear that a warrant must be executed by the Board of Parole within the terms of the sentence. There, the Court said:

> "The Board has no power to recommit a prisoner after his sentence is fully served. The statute contains the power of the Board to retake a parole prisoner to the time 'within the term * * * of the prisoner's sentence'" (at p. 231).

Indeed, the Court went much further in the *Henratty* case, supra. There, the Court held that a paroled prisoner is entitled to have taken into consideration any "good time" allowance he may have been granted, and limited the con-

trol of the warden over him to the term of his sentence less his "good time" allowance. The Court said that:

> "Neither the Board of Parole nor the Court can breathe life into a sentence which has been finally terminated" (p. 232).

No stronger argument can be given in the instant situation that petitioner's parole had expired before the warrant was executed than that evidenced by the conduct of the Board of Parole itself. It is manifest from the record that as early as September, 1941, the Board of Parole concluded that petitioner was no longer on parole. It was in that month that the Board directed petitioner to file a probation report and not a parole report for the month of August, 1941. The only conceivable reason for this instruction is that petitioner from that time forward was required to carry out the probation phase of his sentence, and that parole had been concluded. The Board of Parole is estopped from changing its own procedure.

Respondent has sought to liken the situation at bar with those cases which hold that where a prisoner commits another offense while on parole, and during parole is confined in prison for the commission of this latter offense, a warrant for the revocation of his parole may be held in abeyance until he is released from prison. We are mindful of the line of cases so holding but the reasons for them are obvious. As said the Court in *Adams* v. *Hudspeth*, 121 F. (2d) 270:

> "During the period for which appellant was sentenced for the new and different offense, he was not in legal custody of the Warden upon the parole violator's warrant. Jurisdiction of the Board of Parole over the appellant under the original sentence was effectively interrupted and suspended by his confinement under the latter offense. Service of the two sentences was not concurrent. He occupied the legal status of an escaped convict, or as if he had not been apprehended. Anderson v. Corall, 263 U. S. 193, 196, 44 S. Ct. 43, 69 L. Ed. 247; Zerbst v. Kidwell, 304

U. S. 359, 58 S. Ct. 872, 82 L. Ed. 1399, 116 A. L. R. 808; United States v. Dillard, 4 Cir., 102 F. 2d 94; Hogan v. Zerbst, 5 Cir., 101 F. 2d 634; Aderhold v. Ashlock, 10 Cir., 99 F. 2d 67; Stockton v. Massey, 4 Cir., 34 F. 2d 96, and Ducey v. Hill, D. C., 28 F. Supp. 347" (at p. 272).

Such is not the situation here. First, the Board of Parole terminated petitioner's parole some nine months prior to the execution of the warrant and proceeded with his probation. They must have considered that petitioner was no longer on parole. He was not imprisoned for any new offense. He was always subject to the jurisdiction of the Board. He was available for arrest at any time, for he reported monthly continually until June, 1942.

The difference between the execution of a tardy warrant against one who has been imprisoned for another offense while on parole and one who has not is brought home by the case of *Anderson* v. *Corall,* 263 U. S. 193, which was heard and decided along with *Anderson* v. *Williams,* supra.

As has been hereinbefore mentioned, Williams was released on a writ of habeas corpus, on the ground that the warrant was executed after his sentence had expired. Corall was likewise released. Williams had not been imprisoned for any new offense while he was on parole. Corall had been. An appeal was taken in the *Corall* case and the judgment releasing him reversed. The judgment releasing Williams still stands. The Court said in *Henratty* v. *Zerbst,* 9 Fed. Supp. 230, in referring to the *Williams* and *Corall* cases:

> "This circumstance is significant. The Williams case was decided in the same opinion as the Corall case. Certiorari was granted in the Corall case and the Court of Appeals reversed, but the judgment in the Williams case became final" (at pp. 232 and 233).

In short, it may be said that a tardy warrant is valid when the jurisdiction of the Board of Parole is inter-

rupted by the act of the parolee, such as confinement for another offense. The rule is the same where the parolee absconds or hides or is otherwise not amenable to process. But this is not true here, where the parolee was available at all times and regularly reported to the Board.

The Courts below held in their opinions that the petitioner came within the purview of *Hogan* v. *Zerbst,* 101 F. (2d) 634 (R. p. 15).

It is submitted that the *Hogan* case is not parallel with the one at bar and differs in its essentials. From the statement of facts in the opinion in that case it is clear that when the parole warrant was issued Hogan was in jail on another charge. The opinion specifically states that the parole warrant was lodged with the State Sheriff as a detainer on July 23, 1935. Hogan's maximum sentence expired on November 6, 1935. It is clear, then, that the Board of Parole in that case not only issued the warrant for parole violation before the maximum sentence expired, but executed it in the only way possible before expiration of the maximum sentence by lodging a detainer in the jurisdiction where Hogan was then detained. The *Hogan* case merely follows the long line of decisions which hold that imprisonment on another charge will toll the time for the Board to execute its warrant. However, in all of these cases it must be borne in mind that the Board either executed the warrant in time or performed an overt act tending in that direction, to wit, the lodging of a detainer. Neither was done in the case at bar.

As observed the Court in *Clark* v. *Suprenant,* supra, with respect to the remedy of habeas corpus in these cases:

> "On the general principles governing the law of habeas corpus, the conclusion is irresistible that this is a proper case for the application of that remedy. We do not see that appellee has another remedy that would be adequate and speedy" (94 Fed. [2d] 974).

CONCLUSION

In conclusion, it is respectfully urged that the Courts below have erred in dismissing petitioner's writ of habeas corpus. Accordingly, a writ of certiorari should issue to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court.

Respectfully submitted,

DAVID SAPERSTEIN,
Counsel for Petitioner.